IV.—ARISTOTLE ON THE PUBLIC ARBITRATORS.

The object of this paper is to draw from the newly discovered Ἀθηναίων πολιτεία such information as can fairly be drawn therefrom about the διαιτηταί. The discussion of the bearings of the work upon our knowledge of Athenian law and legal procedure has only begun, and will long continue. Of the articles and books that have come to my hands, besides Kenyon's edition, the only one which goes farther in this direction than to repeat in another form the more obvious statements of Aristotle is the paper of J. H. Lipsius in the Berichte der sächsischen Gesellschaft der Wissenschaften, pp. 41–69. Except so far as may be necessary for clearness, the certain results arrived at by Lipsius will not be repeated here.

The passages which bear upon the subject are in ch. 52, 53, 55, and 58. It is unnecessary to translate or quote them at length, but we may proceed at once to the discussion of them.

1. We have here another illustration of the ἰσοτιμία of the Athenian democracy, combined with the ancient respect for the dignity and dispassionateness of age, in that every Athenian who survived until the last of his forty-two years of liability to military service became *ipso facto* a judicial magistrate, unless indeed he held some other magistracy during that year or was out of the country. The term of service, lasting one year, was, as it were, the crown of the long period of public duties which fell to every full citizen. The explanation which Kenyon gives of the cycle of forty-two years and their ἐπώνυμοι suits all the known facts, and shows us a simple and practical arrangement, which furnished also, as Aristotle tells us, a convenient means of summoning the citizens to military service by their ages. The public records classified every citizen under the archon of the year in which he attained his majority, and under the ἐπώνυμος who marked the place of that year in the cycle. Since names instead of numbers were used for thus marking the year, the series had no fixed beginning or end, but merely a fixed order of succession. We may reasonably assume that the lists were revised every year under the direction of the βουλή, by striking out the names of the

dead or disfranchised and by adding the few names of the newly naturalized. Thus the Forty, at the beginning of their year of office, would find ready to their hand an official and public list of the new διαιτηταί.

2. It is obvious that the number of the διαιτηταί would vary greatly in different years, and all conclusions about their number that have been drawn from the well-known inscription C. I. A. II 943 fall to the ground. In that inscription the διαιτηταί of the year 325–4 B. C., setting up a thank-offering for the customary decree of praise that had been passed by the people in their honor, are enumerated by name, and amount to 103, variously distributed among the different tribes. If now we ask what would be the probable number of Athenian citizens in their sixtieth year at any given time, a precise answer would be sought in vain. We know neither the exact number of Athenian citizens nor the death-rate among them. There can be no doubt, however, that the death-rate was far higher than in modern civilized communities. It is well known that the average duration of human life has vastly increased in Europe and America during the last fifty years; any estimate, therefore, derived from modern statistics of mortality would give far too high a number for ancient Athens. If we assume 20,000 as the number of Athenian citizens above eighteen years of age, we find that by the Northampton table of mortality (constructed from the records of a parish of Northampton, England, for the years 1735–1780 incl.), we might expect to find about 225 between the ages of fifty-nine and sixty. By the Carlisle table, showing a smaller mortality, we might expect to find about 275 between the same ages. The smaller number is certainly nearer the truth than the larger. And when we take into account the absence of sanitary precautions in ancient communities, the frequent recurrence of wars, plagues, and other epidemics, and the undeveloped state of medicine and surgery, there can be little doubt that even 225 is a large average. Moreover, it is clear that the limits of variation would be wide. A long war, or even a single destructive battle, a plague year, an epidemic attacking especially those above middle life, a few weeks of siege, might lessen materially the number of men available for a given year. It is well known also that a variety of circumstances may raise or lower the number of births for a given year far above or below the average. Taking all these things into account, it is not impossible that in 325–4 B. C. there should have been in Athens only

103 able-bodied full citizens of the required age not filling other magistracies.

On the other hand there is a suggestion of Bergk's that deserves to be considered. Following a still earlier suggestion of Ross, Bergk pointed out (Rhein. Mus. VII, p. 133) several dedicatory inscriptions of the πρυτάνεις of different years, in which less than the full number of names appear. For example, in one (C. I. A. II 872, 341–40 B. C., Αἰγηίδος πρυτάνεις) there are forty-nine names; in another (C. I. A. II 329) forty-six names; in another (C. I. A. II 873) only thirty names appear to have been ever inscribed; although in yet others of the same class we find the full number of fifty (e. g. C. I. A. II 864 Λεωντίδος; 868 Οἰνηίδος B. C. 360–59; 869 Ἀντιοχίδος). Whether through indifference or poverty or other hindrance, then, it not infrequently occurred that after an official body voted an offering of this sort, a considerable percentage of the members failed to take part in the execution of the project. On the part of the διαιτηταί mere indifference was more to be expected than with the πρυτάνεις. They were not, as the πρυτάνεις were, men who had sought their office. It came to them as their military duty came; and we see from the description in Dem. against Meidias, 83–87, even making some allowance for rhetorical exaggeration, that at the end of the year a meeting of the body might be very thinly attended. It is highly probable that many out of their number might feel so little interest in the formality of setting up a dedicatory offering for a vote of praise which no longer meant much, as not to contribute to the expense for the sake of having their names inscribed. I incline to the opinion that the inscription of 325–4 B. C. does not include all the διαιτηταί of the year.

The inscription C. I. A. II 944 contains a list of the same sort, arranged in the same way by tribes and demes, with but three letters of διαιτηταί in the superscription, and incomplete. The first six tribes of the former list are lacking; but under Κεκροπίδος are given twenty-four, under Ἱπποθωντίδος twenty, under Αἰαντίδος twenty-four, under Ἀντιοχίδος twenty-three, in all ninety-two names, with space for a few more. The comparatively even distribution of the names among the tribes, in contrast with their distribution on the former stone, is noticeable. Yet Koehler is probably right in assigning the inscription to the same class as No. 943. If now we assume between ninety-two and the number in the other six tribes the same ratio as holds between the corresponding

groups in the preceding inscription, we obtain 231 as the probable number of the original complete list; or if we assume the same average number for each of the other six tribes as that in these four, then the probable entire number would be 230. This number is rather above the probable average size of the college, while 103 is considerably below. The two inscriptions belong to about the same age; there is nothing in the numbers to forbid their being identical in character; while it would be unsafe to build any large structure upon so uncertain foundation, we may fairly believe, until other evidence comes to light, that these figures 103 and 231 represent nearly the extreme limits of size of the college of the *διαιτηταί*. The statement of Ulpian that there were forty-four from each tribe, or 440 in all, is definitely proved to be a mistake.

3. The passages taken together furnish confirmation, if any were still needed, of Bergk's conclusion that the *διαιτηταί* were organized into a college, although no certain light is thrown upon the question of their division into sections, nor upon the problem of the relation of the different sections to the tribes. In ch. 53 the phrase *διανέμουσιν αὐτοῖς τὰς διαίτας* appears to describe a different act from that referred to in the following words, *καὶ ἐπικληροῦσιν ἃς ἕκαστος διαιτήσει*, which clearly denote the selection of the individual arbitrator by lot. To the former expression corresponds in ch. 58 the phrase *διανείμαντα δέκα μέρη*; but how we are to conceive the process of division is not clear, since the cases did not come before the Forty and the Polemarch respectively all at once, but separately from time to time during the year. With regard to the appeal from the college in case a member was condemned on an *εἰσαγγελία*, Aristotle seems to contradict Dem. against Meidias 87, where the force of the argument depends on the representation that Straton, once condemned by the *διαιτηταί*, has no recourse; the phrase *καθάπαξ ἄτιμος γέγονεν* and others cannot be explained away as rhetorical exaggeration. Doubtless between the date of the speech against Meidias and the date of our treatise, 329–5 B. C., the law was changed in order to render impossible such an undeserved misfortune as befell Straton. The description of the division of duties among the *στρατηγοί* in ch. 61 is another instance where, in describing *ἡ νῦν κατάστασις τῆς πολιτείας*, the author brings the treatise fully down to date without mention of the fact that the present arrangement is a very recent one.

4. With regard to the jurisdiction of the *διαιτηταί* and their rela-

tion to other magistrates, the account in the text clears up some questions of long standing, but raises others. With the exception of suits that were required to be determined within one month, it appears from ch. 53 and 61 that private suits involving more than ten drachmas went from the hands of the Forty before a *διαιτητής*. The only essential difference of procedure between suits involving citizens alone and those involving a non-citizen resident was that the former were brought before the Forty at first, while the latter were brought first before the Polemarch and by him referred to one of the ten divisions of the Forty. But what suits are *ἔμμηνοι δίκαι* and how are they treated? The list given in ch. 52 is *προικός, ἐάν τις ὀφείλων μὴ ἀποδῷ, κἄν τις ἐπὶ δραχμῇ δανεισάμενος ἀποστερῇ, κἄν τις ἐν ἀγορᾷ βουλόμενος ἐργάζεσθαι δανείσηται παρά τινος ἀφορμήν* [apparently these would be called *δίκαι ἀφορμῆς*], further, *αἰκείας, ἐρανικαί, κοινωνικαί* [perhaps suits growing out of partnership agreements; Lipsius, Klagen gegen Corporationen], *ἀνδραπόδων καὶ ὑποζυγίων, τριηραρχίας* and *τραπεζιτικαί*. Of this surprisingly long list we are told that the *εἰσαγωγεῖς*, five in number, each acting for two tribes, *τὰς ἐμμήνους εἰσάγουσι δίκας*. The form of expression, with the article, makes the statement a general one, as if the list included all *ἔμμηνοι δίκαι*. It is true the author goes on to mention one other class of *ἔμμηνοι δίκαι* which belong elsewhere. Suits in which the tax-farmers (*τελῶναι*) were involved were *ἔμμηνοι*, yet did not come before the *εἰσαγωγεῖς*, but remained in the hands of the *ἀποδέκται*, who, if the amount at stake did not exceed ten drachmas, were themselves competent to give final judgment, and if the amount at stake exceeded that sum, brought the cases before the *δικαστήριον*. But the whole context is such as to imply distinctly that this is an exception which proves the rule; in other words, that the exception is mentioned for the very reason that it is the only exception, and that all other *ἔμμηνοι δίκαι* belong before the *εἰσαγωγεῖς*. Now Pollux and Harpokration, although they omit most of those given by Aristotle as *ἔμμηνοι*, yet both include under *δίκαι ἔμμηνοι* the *δίκαι ἐμπορικαί*, which Aristotle omits. Pollux expressly states that they came under the jurisdiction of the *εἰσαγωγεῖς* (*οἱ τὰς ἐμμήνους δίκας εἰσάγοντες· ἦσαν δὲ προικός, ἐρανικαί, ἐμπορικαί*). Lipsius meets this disagreement between Pollux and Aristotle by deciding that Pollux, although right in calling the *δίκαι ἐμπορικαί ἔμμηνοι*, is wrong in assigning them to the *εἰσαγωγεῖς*, since we know from ch. 59 of this treatise as well as from (Dem.) 33, 1 and (Dem.) 34, 45 that *δίκαι ἐμπορικαί* belonged before the

θεσμοθέται. Is not another solution of the difficulty more probable? The argument from silence is always to be employed with caution; and in this case the only question is, in which place has Aristotle allowed himself the omission. If he has omitted no ἔμμηνος δίκη from his list of those which the εἰσαγωγεῖς introduce, then he has omitted in both places where it is called for by the context, ch. 52 and 59, the statement that δίκαι ἐμπορικαί before the θεσμοθέται are ἔμμηνοι. But elsewhere in the same article (p. 46) Lipsius himself remarks upon the surprising way in which the recovery of the Ἀθηναίων πολιτεία increases our sense of the trustworthiness of the later grammarians and lexicographers when treating of legal antiquities. Again, on the following page, Lipsius calls attention to a like omission: "Die Liste der vor diese [θεσμοθέται] gehörigen Schriftklagen, bei welchen Parastasis zu erlegen war, wird gegen das im Lexicon Cantabrigiense und bei Harpokration bewahrte Bruchstück um die Klagen συκοφαντίας und δώρων bereichert. . . . Aber es fehlt eine Anzahl anderer Klagen, für welche die Gerichtsvorstandschaft der Thesmotheten durch Rednerzeugnisse feststeht (A. P. S. 78 f.)." And from this fact Lipsius draws the necessary inference that no conclusions can be based upon a failure on the part of Aristotle to mention particular complaints. We are certainly less likely to err in assuming that the positive statement of Pollux rests upon good authority, Aristotle or some one else, than in arguing from the omission of one word in so long a list. It thus becomes probable that this class of ἔμμηνοι δίκαι, after being brought first before the θεσμοθέται, as they had been before they were made ἔμμηνοι, were by them referred, in this period, to the εἰσαγωγεῖς for more speedy action. There is then a certain parallelism between this procedure and that followed with suits involving a non-citizen resident.

Again, with regard to δίκαι αἰκείας, we know from Dem. 37, 33 that they came before the Forty as ἡγεμόνες. Of course it is possible that between the date of the speech πρὸς Πανταίνετον and the date of our treatise the law was changed and δίκαι αἰκείας made ἔμμηνοι; and this is the solution adopted by Lipsius. But if the procedure with δίκαι ἐμπορικαί has been rightly described, then there is no ground for rejecting, but rather reason, from analogy, for accepting the conclusion that δίκαι αἰκείας, which certainly came originally before the Forty, continued after being made ἔμμηνοι to be brought before the Forty in the first instance, and were by them referred to the εἰσαγωγεῖς. The question then arises whether a like

course was not followed with the other *δίκαι ἔμμηνοι* which came before the *εἰσαγωγεῖς*. Certainly the *δίκαι προικός* were of a nature to come before the Archon, and it was held by Meier and others that such cases did come before the Archon, until the existence of the *εἰσαγωγεῖς* and their function with relation to *ἔμμηνοι δίκαι* was rendered indisputable. So too *δίκαι ἀφορμῆς, ἐρανικαί, κοινωνικαί, τραπεζιτικαί*, and suits for damage wrought by slaves and draught animals, were all of a character to come naturally before the Forty; while suits growing out of the trierarchy, so far as they were between individuals merely, would seem to belong before the *στρατηγοί*, or, at the date of our treatise, before the *στρατηγὸς ἐπὶ τὰς συμμορίας*. It is to be observed that we have nowhere an express statement that the *εἰσαγωγεῖς* had original jurisdiction, or that they possessed any independent authority for deciding of themselves cases involving less than ten drachmas. Their name is appropriate to their function, and their place in the judicial system is more intelligible, on the supposition that they were so named because it was their sole duty to receive *δίκαι ἔμμηνοι* from other magistrates and see that they were carried through within the required period.

One step further. The *δίκη αἰκείας* against Konon had already been heard before a *διαιτητὴς κληρωτός* (Dem. 54, 26). If *δίκαι αἰκείας* were already *ἔμμηνοι*, we should then have an *εἰσαγωγεύς* referring a suit to a *διαιτητής*; in that case there is justification for the statement of Pollux (VIII 93) quoted by Lipsius (A. P. p. 94) only for the purpose of discrediting it: *εἰσαγωγεῖς ἀρχῆς κληρωτῆς ὄνομα· οὗτοι δὲ τὰς δίκας εἰσήγαγον πρὸς τοὺς διαιτητάς*. As a universal statement this cannot, of course, be true, for not all complaints that were referred to the *διαιτηταί* were *ἔμμηνοι*; it is, however, by no means impossible, but rather probable, that *δίκαι ἔμμηνοι* in general were referrible to *διαιτηταί*, and were brought before a *δικαστήριον* only on appeal. I see no reason for Lipsius' assumption that thirty days were too short a time to permit such reference. It is to be remembered that the *ἀνάκρισις* before the arbitrator did not have to be repeated. The case might easily be brought before a *δικαστήριον* on the second or third day after the decision of the arbitrator was rendered; and even if we allow so much as ten days for him to come to a decision, the time still appears to be sufficient.

Finally, Aristotle's treatment of the subject of the *διαιτηταί* is a fair illustration of the manner in which the entire constitution is

handled in the Ἀθηναίων πολιτεία. The treatise does not aim at absolute completeness. Details are often not given as fully as we could wish; now and then an omission, occasionally a downright slip, may excite surprise. The writer, in short, is not affected by the passion for *Vollständigkeit*, but sets forth the Athenian political and legal system in broad outlines. If we make due allowance for the difference in the complexity of the two subjects, and for the vast difference between the pioneer and the latest worker in the field, we shall find many points of resemblance between the treatise of Aristotle and the recent work of Mr. Bryce on our own commonwealth. The latter book is indeed a lineal descendant of the former.

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